

**OKLAHOMA GAS & ELECTRIC COMPANY**

**Complainant,**

**V.**

**UNION PACIFIC RAILROAD COMPANY**

**Defendant,**

Docket NOR 42111

**REPLY IN OPPOSITION TO PETITION FOR**  
**LEAVE TO FILE A REPLY TO REPLY**

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**Dated: March 13, 2009**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

OKLAHOMA GAS & ELECTRIC COMPANY	)	
	)	
Complainant,	)	
	)	
v	)	Docket NOR 42111
	)	
UNION PACIFIC RAILROAD COMPANY	)	
	)	
Defendant.	)	

**REPLY IN OPPOSITION TO PETITION FOR  
LEAVE TO FILE A REPLY TO REPLY**

Complainant Oklahoma Gas & Electric Company ("OG&E"), pursuant to 49 CFR §1104.13(a), hereby files this Reply in Opposition to Petition for Leave to File a Reply to Reply ("Petition") filed by the defendant Union Pacific Railroad Company ("UP") on February 26, 2009 in this case. For the reasons set forth below, the Board should deny the Petition and reject the accompanying proffered Reply to OG&E's Reply Evidence ("Proffered Reply to Reply"). Both the Petition and the Proffered Reply to Reply incorrectly portray OG&E's Reply Evidence, and respond to "misstatements," "claims" and "suggestions" that OG&E has not made. Accordingly, these filings add nothing of value to the record in this case, and they should be rejected. *Illinois Central Railroad Company – Construction and Operation Exemption – In East Baton Rouge Parish, LA*, Docket 33877, slip op. at 1 (served May 25, 2001) (rejecting reply to reply because existing pleadings "afford ample basis for a decision").

### Argument

UP's Petition fails to even cite the Board's regulation prohibiting replies to replies, 49 CFR, §1104.13, let alone make *any* legal arguments or cite *any* Board precedent that would support waiving this regulatory prohibition and granting the Petition and accepting the Proffered Reply to Reply. Instead, UP seeks permission to file the Proffered Reply to Reply based on an alleged "significant misstatement of fact" in OG&E's Reply Evidence that is nowhere found in that document. Specifically, UP erroneously states that OG&E "suggest[ed]" the parties in *Kansas City Power & Light Company v. Union Pacific Railroad Company* used indexed URCS variable costs to calculate reparations. Petition at 2. OG&E made no such suggestion. UP bases its assertion on the statement in OG&E's Reply Evidence that "this case should be no different than any other coal rate case." OG&E Reply Evidence at II-A-8. UP has taken this statement completely out of context. Even a cursory reading of the paragraph from which that quotation was taken reveals that OG&E was merely citing the fact that in *KCPL* and other cases where the Board established the initial maximum reasonable rates based on indexed URCS costs, the defendant was ordered to pay reparations, which the parties subsequently conferred upon and calculated. In *KCPL*, the Board established the initial prescribed rates at the jurisdictional threshold based (in part) on indexed URCS costs. It also ordered UP to pay reparations, which the parties subsequently mutually calculated and then informed the Board of this fact. OG&E's point in its Reply Evidence is that there is no reason for the Board to take a different approach in this proceeding. Nowhere in its Reply Evidence does OG&E state or infer, or "reach[] the wrong conclusion," UP Proffered Reply to Reply at 3, that in *KCPL* the parties used indexed URCS costs to calculate reparations in that case. Indeed, prior to UP's disclosure of it in this proceeding, the methodology UP and *KCPL* used to calculate reparations in *KCPL* was not in the

public record so neither OG&E nor any other third party could have known whether indexed URCS costs were used or not.

UP's additional attempt to elevate a typographical error in a citation to the level of a "significant misstatement of fact" is simply ludicrous, and obviously provides no justification for waiving the rules against filing "replies to replies." Finally, the Proffered Reply to Reply is supported by the Verified Statement of Mark J. Draper of UP, who takes even greater liberties with OG&E's Reply Evidence by affirmatively - and wrongly - stating his "understanding" is that OG&E "is claiming" that KCPL and UP used indexed URCS variable costs to calculate reparations in *KCPL*. This is false, and accordingly Mr Draper's Verified Statement is superfluous and would add nothing to this proceeding.

OG&E's Reply Evidence is clear and speaks for itself. The Board should therefore summarily deny UP's Petition and reject the Proffered Reply to Reply.

Respectfully submitted,



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March 13, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of March 2009, I served a copy of the foregoing by hand delivery, upon counsel for the Defendant at the following address:

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